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IN THE
Supreme Court of the United States

SUPAP KIRSTAENG, DBA BLUECHRISTINE99,
Petitioner,

v.

JOHN WILEY & SONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Intellectual Property Owners Association is a trade association representing companies and individuals in all industries and fields of technology that own or are interested in intellectual property rights.[1] IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as an inventor, author, executive, law firm, or attorney member. Founded in 1972, IPO represents the interests of all owners of intellectual property IPO regularly represents the interests of its members before Congress and the United States Patent and Trademark Office and has filed amicus curiae briefs in this court and other courts on significant issues of intellectual property law. The members of IPO's board of directors, which approved the filing of this brief, are listed in the appendix.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel of party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to its preparation or submission. Counsel for both parties consented to the filing of this brief via blanket consent letters filed with the Court on February 11, 2016.

[2] IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

INTRODUCTION

This case presents an important opportunity for this Court—consistent with its holding in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)—to resolve the split in the circuits on how equitable factors are considered in awarding attorneys' fees in copyright cases. Attorneys' fees should be based on a review of all equitable factors and not a product of a formulaic approach that disproportionately weighs certain factors more than others. Each case should be reviewed under the discretionary standards provided under the statute. *See* 17 U.S.C. § 505. A uniform standard would place all litigants in copyright cases on the same footing in requesting attorneys' fees.

Under copyright law, a court may exercise equitable discretion to award attorneys' fees based on the objective unreasonableness of the claims and other factors, in a way that is "faithful to the purposes of the Copyright Act" and evenhanded to plaintiffs and defendants. *Fogerty*, 510 U.S. at 534 n.19. This Court has clarified that the Copyright Act's purpose is "more complex, more measured" than "maximizing meritorious infringement suits." *See id.* at 526. It has also rejected using a "precise rule or formula" for making fee determinations. *See id.* at 534.

This appeal is from the Second Circuit, which always gives the objective unreasonableness factor substantial weight. It reasons that the purpose of the Copyright Act would typically not be served by assessing a copyright holder a fee for pursuing an objectively reasonable claim. Although the objective unreasonableness factor should be considered, the

automatic heavy weighting of this factor does not allow other equitable factors to be properly considered. Other circuits follow other formulaic approaches to awarding attorneys' fees to prevailing parties without properly considering equitable factors on a case-by-case basis.

IPO seeks a deep look at this issue. The Court should take this opportunity to review the current state of attorneys' fee law in the various circuits and provide a flexible and case-specific approach to fee awards that rejects formulas and precise rules and supports a review of all equitable factors in copyright cases.

SUMMARY OF ARGUMENT

A. A Review of the Circuits Reveals Divergent Applications of the Equitable Factors with the Ninth Circuit Approach Following *Fogerty* and Rejecting a Formulaic Approach That Does Not Take Into Account All Equitable Factors

The Ninth Circuit has held that "[f]aithfulness to the purposes of the Copyright Act is...the pivotal criterion" in the attorneys' fee analysis. *Berkla v. Corel Corp.*, 302 F.3d 909, 923 (9th Cir. 2002). It has also explained that it evaluates whether fee awards are evenhanded. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 559 (9th Cir. 1996). In other words, its approach tracks exactly with this Court's *Fogerty* opinion. Moreover, the Ninth Circuit's approach is flexible and allows a court to consider all factors, so long as they further the purposes of the Copyright Act and are

evenhandedly applied." *See Fantasy*, 94 F.3d at 558. Because the Ninth Circuit's approach is flexible, a party can make an argument to convince a court that in the particular case before it the objective unreasonableness factor should be given substantial weight: "While no longer a prerequisite to a fee award, the objective unreasonableness of a losing party's claim can be a relevant indicator of whether the Act's primary objective is being served by the litigation." *See SOFA Entm't, Inc. v. Dodge Prods.*, 709 F.3d 1273, 1280 (9th Cir. 2013) (internal quotations omitted). Thus, this approach allows courts to flexibly exercise their equitable discretion by avoiding a rigid rule that the objective unreasonableness factor must be or must never be given substantial weight.

B. A Formula That Requires Giving Substantial Weight to the Objective Unreasonableness Factor When Assessing Attorneys' Fees Should Be Rejected

The Second Circuit requires its district courts to use a precise rule to decide whether to grant attorneys' fees in copyright cases. The Second Circuit always gives the objective unreasonableness factor substantial weight. This approach prevents trial courts from giving less weight to the objective unreasonableness factor, even if the facts before the trial court call for less weight to be given to that factor. It creates a rigid framework that a trial court must use when evaluating relevant factors. Other factors, such as bad faith, litigation conduct, and the motivation behind the action, are diminished even if more important to the particular case. An approach like this one, which prescribes a "precise rule" for

what weight to give a particular factor—regardless of the particular circumstances of the case—should be rejected by this Court.

C. Presumptions in Favor of Fees Should Be Rejected

The Seventh Circuit and Fifth Circuit have created a presumption in favor of granting fees to the prevailing party. This approach, by favoring certain outcomes at the beginning, is not flexible. And it does not give trial courts the opportunity to appropriately weigh other relevant facts and circumstances against the fact that the prevailing party won. Absent the formulaic presumption in favor of fees, a court might view other facts, circumstances, or factors as more significant and decisive in favor of not granting attorneys' fees. This Court has previously rejected restraining a trial court's equitable discretion in this way, and it should do so again here. *See Fogerty*, 510 U.S. at 534.

D. The Objective Unreasonableness Factor Can Be Given Substantial Weight by the Trial Court While Assessing Other Equitable Factors

The trial court should have the flexibility when exercising its equitable jurisdiction to decide whether to give substantial weight to this factor. It has the most intimate knowledge of the parties, the arguments, and the proceedings to determine whether the objective unreasonableness factor should be given substantial weight. This kind of flexibility is in accord with this Court's reasoning in *Fogerty* and in other

intellectual property cases involving equitable discretion. *See eBay v. MercExchange*, 547 U.S. 388 (2006); *see also Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).

ARGUMENT

This Court held that a court exercising its equitable discretion to grant fees under 17 U.S.C. § 505 should consider various non-exclusive factors: "[1] frivolousness, [2] motivation, [3] objective unreasonableness (both in the factual and in the legal components of the case) and [4] the need in particular circumstances to advance considerations of compensation and deterrence" when deciding whether to grant fees. *See Fogerty*, 510 U.S. at 534 n.19. The Court noted that the paramount consideration of these and any other factors is whether "such factors are faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner." *See id.* at 534. It also clarified the meaning of the "purposes of the Copyright Act": "More importantly, the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement." *See id.* at 526.

In sum, the Court held that a court exercising its discretion (1) should not apply a formula; (2) should consider various factors that "are faithful to the purposes of the Copyright Act"; (3) should not presume that the "purposes served by the Copyright Act" are promoted by "simply maximizing the number

of meritorious suits for copyright infringement"; and (4) should apply an approach that treats "prevailing plaintiffs and defendants in an evenhanded manner."

I. The Ninth Circuit's Approach to Awarding Attorneys' Fees Conforms Best to *Fogerty*, Because It (1) Focuses on Whether the Fee Award "Further[s] the Purposes of the Copyright Act" and Is "Evenhandedly Applied," and (2) Is Flexible and Avoids Formulas

The Ninth Circuit fully adopted this Court's guidance in evaluating when to grant attorneys' fees in copyright cases: "[f]aithfulness to the purposes of the Copyright Act is, therefore, the pivotal criterion." *Berkla*, 302 F.3d at 923. It also has affirmed that district courts must apply their discretion in a way that is evenhanded. *See Fantasy*, 94 F.3d at 559. The Ninth Circuit's approach tracks exactly with this Court's *Fogerty* opinion.

The Ninth Circuit approach follows the type of flexible analysis required by *Fogerty* by allowing a court to consider all the *Fogerty* factors, or other factors, so long as—in the context of the case—those factors "further the purposes of the Copyright Act and are evenhandedly applied." *See Fantasy*, 94 F.3d at 558. The objective unreasonableness factor is one of these factors. And in the right context, it should be given substantial weight. As the Court found in *SOFA*, "While no longer a prerequisite to a fee award, the objective unreasonableness of a losing party's claim can be a relevant indicator of whether the Act's primary objective is being served by the litigation." *See* 709 F.3d at 1280 (internal quotations omitted); *see*

id. (holding that in the case before it the objective unreasonableness factor was significant enough to warrant a fee award).

The appropriate weight to give the objective unreasonableness factor is an argument that should be made in each case. Automatically giving this factor substantial weight prevents a court from weighing it based on the circumstances of the case before it and without particular consideration of whether that weighting is "[f]aithful[] to the purposes of the Copyright Act." *Berkla*, 302 F.3d at 923.

Automatically giving a particular weight to any factor is a formulaic approach that does not track with this Court's ruling in *Fogerty*. Thus, this Court should reaffirm its *Fogerty* ruling and point to the Ninth Circuit's flexible approach as a source of guidance to the other circuit courts.[3]

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[3] Kirtsaeng lists several circuits as being "rudderless," in their fee-award analysis, but that description exaggerates the difference between their approaches and *Fogerty*. *See Bridgeport Music, Inc. v. WB Music Corp.*, 520 F.3d 588, 592 (6th Cir. 2008) ("This discretion must be exercised in an evenhanded manner with respect to prevailing plaintiffs and prevailing defendants, and in a manner consistent with the primary purposes of the Copyright Act."); *see also Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503, 506 (4th Cir. 1994) (noting that *Fogerty* requires analyzing various factors in a manner that is "faithful to the purposes of the Copyright Act"). The Third Circuit—while it has not expressly discussed the "purposes of the Copyright Act"—recognizes that *Fogerty* governs the non-exclusive factor analysis. *See Lowe v. Loud Records*, 126 Fed. Appx. 545, 547 (3d Cir. 2005) (unpublished) (noting the applicability of *Fogerty*'s footnote 19 to the fee-award analysis, which includes the "purposes of the Copyright Act" language). But these circuits have not developed the same depth of jurisprudence for determining when factors are "faithful to the purposes of the Copyright Act" that has been produced by the Ninth Circuit. It also does not appear that the Eleventh Circuit

II. The Second Circuit's Approach of Always Giving the Objective Unreasonableness Factor Substantial Weight Prescribes a Precise Rule, Which Is Contrary to This Court's Ruling in *Fogerty*

The Second Circuit—in applying *Fogerty*—has determined that the objective unreasonableness factor must always be given "substantial weight," because it determined that "the imposition of a fee award against a copyright holder with an objectively reasonable litigation position will generally not promote the purposes of the Copyright Act." *Matthew Bender & Co. v. West Publ'g. Co.*, 240 F.3d 116, 122 (2d Cir. 2001). It came to this conclusion based on its understanding that "[t]he principle purpose of the [Copyright Act] is to encourage the origination of creative works by attaching enforceable property rights to them." *Id.* (internal quotations and citations omitted).

This approach conflicts with some of the requirements in *Fogerty*: (1) it requires a formula—always giving the objective unreasonableness factor "substantial weight"; (2) it considers the objective unreasonableness factor solely within the context of

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emphasizes the "purposes of the Copyright Act" the same way the Ninth Circuit emphasizes it. *See, e.g.*, *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 754 (11th Cir. 1997) (applying *Fogerty* factors without expressly discussing the "purposes of the Copyright Act").

whether it will maximize or encourage the filing of meritorious copyright infringement suits, but this does not always promote the purposes of the Copyright Act; and (3) it requires diminishing the relevance or weight of other factors relative to the objective unreasonableness factor, regardless of particular circumstances of the case.

Here, the Second Circuit even noted that the trial court might have improperly weighted and analyzed whether compensation was warranted in this case based on Mr. Kirtsaeng's pro bono representation. *John Wiley & Sons, Inc. v. Kirtsaeng*, 605 Fed. Appx. 48, 50 n.2 (2d Cir. 2015) (unpublished) *cert. granted*, 136 S. Ct. 890 (2016). But it did not explore the issue because the trial court had to give substantial weight to the objective unreasonableness factor, a rule that controlled the Second Circuit's review of the trial court's exercise of discretion: "[T]hese factors did not outweigh the 'substantial weight' afforded to John Wiley & Sons' objective reasonableness." *See id.* at 50.

Now, it may be that in this case—especially because of the uncertainty of the law—that the objective unreasonableness factor should be given substantial weight. But neither the trial court nor the Second Circuit had to decide that issue because *Matthew Bender* requires courts in the Second Circuit to give that factor substantial weight, regardless of the circumstances in the case. Even though it is possible for other factors to outweigh this factor, the analysis will always be skewed by the substantial weight a court must give the objective unreasonableness factor following the *Matthew Bender* rule. This is not a flexible, nonformulaic

approach as required by *Fogerty*, which states, "There is no precise rule or formula for making these determinations," but instead equitable discretion should be exercised "in light of the considerations we have identified." *Fogerty*, 510 U.S. at 534. Hence, this Court should reject the Second Circuit's automatic weighting approach.

III. Other Formulaic Approaches That Favor Granting Fees—Like the Seventh Circuit's and Fifth Circuit's Approaches—Should Also Be Rejected Because This Court in *Forgerty* Required a Flexible and Non-Formulaic Approach

Despite the Supreme Court rejecting rules for awarding fees, the Seventh Circuit has held that, in accordance with *Fogerty*, "the prevailing party in copyright litigation is presumptively entitled to reimbursement of its attorneys' fees." *Riviera Distribs., Inc. v. Jones*, 517 F.3d 926, 928 (7th Cir. 2008). This approach developed from cases creating a presumption in favor of prevailing plaintiffs when damages are small and for prevailing defendants, because "without the prospect of such an award, the party might be forced into a nuisance settlement or deterred altogether from exercising his rights." *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 437 (7th Cir. 2004). These earlier cases—although using a formulaic approach—were limited to particular factual scenarios. It now appears that the rule that developed in those earlier cases expanded into a presumption that fees should be awarded to a prevailing party regardless of the factual circumstances. *Jones*, 517 F.3d at 928.

Similarly, the Fifth Circuit has a formulaic "*McGaughey* rule" that treats attorneys' fees as discretionary, but requires that attorneys' fees are "the rule rather than the exception and should be awarded routinely." *See Hogan Sys., Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319, 325 (5th Cir. 1998). The Fifth Circuit in *Hogan* rejected the losing party's argument that the *Fogerty* decision overruled this approach to awarding fees, because it held that this Court rejected only the "British Rule" that "mandates the award of attorney's fees." *See id.* at 325. Based on this reading of *Fogerty*, the Fifth Circuit upheld the trial court's award of attorneys' fees to the prevailing party.

But this Court was clear that "'[t]here is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" *Fogerty*, 510 U.S. at 534 & n.19 (listing various factors that may be considered in deciding whether to award attorneys' fees).

In contrast, the Seventh Circuit uses a presumption in favor of prevailing parties, which requires a district court to use a rule that diminishes the importance of factors that a court might consider in granting fees. *Jones*, 517 F.3d at 928. And the Fifth Circuit uses a rule approach—the "*McGaughey* rule"—which is not as mandatory as the British Rule, but still requires that fees are "the rule rather than the exception." *See Hogan*, 158 F.3d at 325. This is exactly the kind of formulaic and rigid decision making this Court rejected in *Fogerty*. And it does not explicitly take into account whether granting fees is

"faithful to the purposes of the Copyright Act." *Fogerty*, 510 U.S. at 534 n.19.

IV. This Court Should Clarify That the Trial Court in This Case Might Have Been Justified in Giving the Objective Unreasonableness Standard Substantial Weight; But on Remand, This Issue Should Not Be Decided Using a Formulaic Approach That Automatically Gives This Factor Substantial Weight

Making this clarification is consistent with this Court's guidance that courts should not apply rigid formulas when deciding whether to grant equitable relief in other intellectual property cases; for example, the reasoning found in *eBay* and *Octane Fitness*.

In *eBay*, this Court explained that when a court considers factors for granting equitable relief (injunction) it cannot use categorical rules. *See* 547 U.S. at 393–94 (rejecting categorical rules for balancing factors that have to be considered in granting equitable relief). And in *Octane Fitness*, this Court held that "district courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Octane Fitness*, 134 S. Ct. at 1756. This approach was then analogized to the flexible approach this Court adopted in *Fogerty*. *See id.* at 1756.

Because the exercise of equity is traditionally flexible—a point this Court has emphasized many times—this Court should reaffirm the flexible

approach it adopted in *Fogerty*, an approach that has been followed in the Ninth Circuit. And this Court should reject formulaic approaches that always require certain factors to be considered or given certain weight or that have presumptions in favor of fees.

But because awarding fees requires a flexible approach, it might be that in any particular case the objective unreasonableness factor at issue here should be given substantial weight. Indeed, in this case—because of the lack of clarity in the law—it might very well be appropriate for the district court to give this factor substantial weight. Many future parties and the law benefited from John Wiley filing the underlying lawsuit that led to this Court's first *Kirtsaeng* opinion.

Thus, the district court's ruling on fees might not be wrong. It should be clear that—under a flexible approach—the district court may decide that certain factors should be given substantial weight based on the circumstances of the case and whether that weighting is "faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner." *See Fogerty*, 510 U.S. at 534. In this case, it could be that the objective unreasonableness factor should be given substantial weight. That should be made clear to the lower courts.

CONCLUSION

This Court has rejected any formulaic approach to weighing factors to decide whether to grant or deny attorneys' fees. Here, the Second Circuit approach of always giving substantial weight to the objective unreasonableness factor is a formulaic method of weighing an attorneys' fee factor. This automatic weighting does not give effect to the Supreme Court's admonition that a factor should only be considered in light of how it furthers the purposes of the Copyright Act on a case-by-case basis.

In addition, the Ninth Circuit already uses an approach that affects many copyright holders that meets *Fogerty*'s requirements for granting attorneys' fees in copyright cases. This approach is superior to the formulaic approach required by the Second Circuit and the presumptions in favor of fees in the Fifth and Seventh Circuits.

Because the Ninth Circuit approach is in line with *Fogerty*, there is already a body of case law that other circuits can rely on in analyzing these types of cases, once this Court reaffirms *Fogerty*.

Thus, this Court should (1) reaffirm its *Fogerty* holding embodied by the Ninth Circuit's attorneys' fees jurisprudence; (2) reject the formulaic approach of the Second Circuit; (3) reject other formulaic approaches, like the Seventh Circuit's and Fifth Circuit's presumption in favor of fees; and (4) clarify that this Court's holding does not require the lower courts to grant Kirtsaeng's attorneys' fees claim—it might be appropriate on remand to give substantial

weight to the objective unreasonableness factor based on the particular circumstances of this case.

Respectfully submitted,

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